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No. 89-1840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KULALANI, LTD., ET AL.,

Petitioners,

v.

LILLIAN HAGOPIAN COREY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO BRIEF IN OPPOSITION

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STATUTES INVOLVED

11 U.S.C.S. § 363(m) provides:

"(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

ALLEGED INACCURACY IN THE PETITION

Respondents begin their Brief in Opposition with a section titled "Comments on Inaccuracies in Statement of Facts." Br.Op., pp. 1-3. Only one "inaccuracy" is discussed. *Id.*, p. 1, l. 22 to p. 2., l. 14. Respondents complain of Petitioners' allegedly misleading use of the term "*ex parte*" in reference to the two closed hearings, on September 2, 1987 and May 27, 1988.

The term "*ex parte*" was used by Petitioners in the sense of "*ex parte* hearing" as defined in *Black's Law Dictionary*, 5th edition, page 517:

"Hearings in which the court or tribunal hears only one side of the controversy."

Even though the hearings were "on-the-record," "official" court proceedings, they were *ex parte* because only one party participated in the hearing.

STATEMENT OF THE CASE

While raising only this one alleged inaccuracy in their "Comments on Inaccuracies," Respondents made several statements of their own about the record which require response by Petitioners:

1. Br.Op., p. 2, ll. 2-3. Respondents state that attorney James Duca was a "court appointed" attorney. Actually, he was employed by COREY with approval of the court. C.R. 29.

2. Br.Op., p. 2., ll. 6-9. Respondents state that Petitioners were properly excluded from participation in the hearings of September 2, 1987 and May 27, 1988, because privileged and confidential matters were likely to be discussed. In fact, no privileged or confidential matters were discussed at either hearing. See Pet.App., pp. 187-231.

3. Br.Op., p. 2., ll. 11-12. Respondents state that Petitioners were properly excluded from participation in the hearings of September 2, 1987 and May 27, 1988. Petitioners do not complain of being excluded from the hearings, but rather of the improper discussion by the court in their absence of the activities of ELLIS and the status of the Silversword Inn.

4. Br.Op., p. 2, ll. 26-27. Respondents state that the argument that the *Grinnell* extrajudicial source rule should not be applied to § 455(a) was only alluded to by ELLIS, and not raised by the other Petitioners at all.

Actually, the precise argument was made by ELLIS in his *reply* brief in CA. NO. 88-15351, as follows:

> "Sec. 455(b)(1) and 28 U.S.C., Sec. 144, are encrusted with layers of judicial gloss misconstruing 'extrajudicial.' Such is not the case with Sec. 455(a); an 'extrajudicial source' of bias or prejudice is not essential to disqualification." Reply Brief of Appellant William S. Ellis, Jr., CA. NO. 88-15351 & 88-15595, p. 22.

Petitioner RYAN joined in ELLIS' argument by filing a joint opening brief with him in CA. NO. 88-15350 and CA. NO. 88-15778, and a joint reply brief in CA. NO. 88-15778. ELLIS' opening brief in 88-15351 was incorporated by reference in the opening brief in CA. NO. 88-15778 and his reply brief in CA. NO. 88-15351 was incorporated by reference in his reply brief in CA. NO. 88-15778.

Petitioners KULALANI *et al.*, joined in ELLIS' argument in their reply brief in CA. NO. 88-15350 at page 3, and by joining in his opening brief in CA. NO. 88-15779[1].

As a final note, all Petitioners raised the argument that the *Grinnell* rule does not apply to § 455(a) in their suggestion for hearing *en banc*, as follows:

> The points of law set forth in *Liljeberg* [*v. Health Service Acquisition Corp.*, 486 U.S. 847,

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[1] While KULALANI *et al.*, joined in this opening brief, they expressed their separate opinion that the prejudice of Judge Pence was harmless error in the event the Judgment on the title issue were affirmed. This position was based on KULALANI'S position in CA. NO. 88-15351 that all of the findings of fact by Judge Pence were either irrelevant, immaterial or not supported on the record. The Court of Appeals did not address these points in its opinion. Instead, the Court of Appeals relied heavily on the trial court's findings of fact in its decision.

108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)], which was cited in Petitioners' brief, were apparently overlooked by this Court. *Liljeberg* does not cite *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), and does not turn on whether the alleged bias or prejudice is derived from an 'extrajudicial source.'" Petition for Rehearing and Suggestion of Rehearing En Banc, pp. 8-9.

5. Br.Op. p. 2, ll. 27-29. Respondents state that ELLIS claimed no interest in the Inn at the time that COREY filed her petition in bankruptcy, on August 6, 1984. The record is to the contrary. Appendix A, attached to the Brief in Opposition shows that ELLIS had filed an Answer to COREY's amended adversary complaint in Adv. No. 85-0185, on June 23, 1986. C.R. 18. This answer contains affirmative claims, in which ELLIS alleges in paragraph 12, p. 7, that he conveyed his interest in the Inn to KULALANI by warranty deed dated September 2, 1980, and had not yet received the full consideration for said conveyance. This claim was withdrawn by ELLIS *without prejudice*, on December 16, 1986. C.R. 43.

Thus, ELLIS had a claim to the Inn for an equitable lien securing the payment of the purchase price. *State by Pai v. Thom*, 58 Haw. 8, 17-18, 563 P.2d 982, 989 (1977). He further had an interest in establishing title of his grantee under warranty deed.

6. Br.Op. p. 2, ll. 33-34. Respondents state that ELLIS presented no evidence that he later acquired an interest in the Inn.

As ELLIS had withdrawn his claims *without prejudice*, it was not necessary to acquire an interest later. Nevertheless, he did, in fact, acquire additional interests in

the Inn subsequently. Appendix B to the Brief in Opposition shows that, on May 1, 1988, KULALANI, deeded the Inn to FLORENCE, subject to a fourth mortgage assigned to ELLIS on May 1, 1988 and a lease assigned to ELLIS on April 13, 1988.

7. **Br.Op. p. 3, ll. 12-19.** Respondents note that ELLIS did not formally seek leave to intervene in the trial on the title issue, and accuse him of "last-minute maneuvering to interject himself into a case from which he had been dismissed."

Actually, ELLIS did not "interject himself" into the controversy, Judge Pence dragged him in. As noted in the Petition, the title issue arose when RYAN objected to COREY's motion to sell the Inn pursuant to 11 U.S.C. § 363. See Pet. App. pp. 75-80. Judge Pence decided he needed to determine the title issue and *sua sponte* vacated the order dismissing the adversary proceedings in the ELLIS bankruptcy. *Id.* The title "trial" was conducted in a proceeding consolidating the ELLIS and COREY bankruptcies. Pet. App. p. 134. It was not necessary for ELLIS to intervene into the ELLIS adversary proceedings.

CONFLICT AMONG THE CIRCUITS

In the Brief in Opposition, Respondents argue there is no conflict among the Circuits because the First Circuit has held that "disqualification for personal bias or prejudice necessitates a showing that the alleged bias and prejudice be both personal and extrajudicial."

Petitioners have misapplied this holding to § 455(a). The First Circuit has repeatedly held that the "extrajudicial source" rule does *not* apply to § 455(a), as pointed out in the Petition.

The split among the circuits was discussed by Senior Circuit Judge John R. Brown, of the Fifth Circuit, sit-

ting by designation in the First Circuit in *United States v. Chantal*, 902 F.2d 1018 (1st Cir. 1990). In that case, the District Judge had refused to disqualify himself on the grounds that no "extrajudicial source" had been advanced in support of disqualification. On appeal, Judge Brown wrote:

> "The trial judge in his memorandum briefly but pungently demonstrated that he was judging his appearance of impartiality by the wrong standard.
>
> "With solid ground in the Fifth and Ninth Circuits, but not in the First the judge held that his remarks were immune from § 455(a) testing because, in his own words, Chantal's:
>
> > allegation of fact . . . clearly implies that the basis for the claim of bias or prejudice is information known to the judge because of his performance of judicial duties in defendant's prior case.
>
> "To make it even clearer he added:
>
> > The information is not from an 'extra-judicial source' and is therefore not an adequate basis to force recusal [*citing Cooper, Grinnell Corp.*].
>
> "The First Circuit, however, has repeatedly subscribed to what all commentators characterize as the correct view that, unlike challenges under 28 U.S.C. § 144, the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." *United States v. Chantal, supra*, 902 F.2d at 1021-22. [Footnotes omitted.]

To further emphasize the split among the circuits, Judge Brown remarked in a footnote, as follows:

> "10. Lest I commit myself to judicial harakiri I hastily acknowledge that at home I must and will follow the Fifth Circuit's holdings, *see* note 6, *supra* which from the vantage of the First Circuit is wrong." *Id.* at 1022.

The split of authority among the circuits is clear and should be resolved by this Court.

MOOTNESS OF APPEAL

Respondents argue that this appeal is rendered moot because the plan has been consummated and the property sold. They also cite 11 U.S.C. § 363(m).

Sec. 363(m) provides that a sale by a trustee during bankruptcy administration to a purchaser in good faith cannot be set aside on appeal from the order authorizing the sale unless a stay has been obtained. This statute does not apply to the instant case for a number of reasons. The most obvious reason is that the alleged "sale" was not made pursuant to subsection (b) or (c). *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1553 (11th Cir. 1988); see also *Matter of Texas Extrusion Corp.*, 844 F.2d 1142, 1165 (5th Cir. 1988). On its face the purported "sale" to the LOUIS was authorized under subsection 363(f). See Br.Op.App. F, p. 22a, ¶ 5.

Thus the appeal could be rendered moot only under the traditional analysis of finality of bankruptcy orders. *See Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 194-5 (1977).

Under this analysis, there is no impediment to this Court setting aside the purported "sale" to the LOUIS.

The LOUIS are not purchasers in good faith without notice. *See In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 150-1 (1986). The LOUIS did not give any consideration other than offset of a portion of their judgment against COREY. Moreover, the LOUIS took the property with full knowledge of Petitioners' claim of title, having participated in this litigation throughout.

But even if the so-called sale to the LOUIS cannot be set aside by an appellate court, this appeal is not thereby rendered moot. The issue presented to this Court is whether or not Judge Pence should have disqualified himself. This issue is far from moot. Both the ELLIS and COREY bankruptcies are still pending. Judge Pence is still issuing orders. Indeed, he issued the order which Respondents now claim renders this appeal moot.[2] He continues to issue orders adverse to Petitioners' interests. Who knows what he may do in the future if he is not ordered to step aside?

Further, if Petitioners are successful herein, the title issue can be reopened since it is based on factual findings made by a judge who was not impartial. Even if the sale cannot be set aside, the title issue is not rendered moot. If Petitioners are the rightful owners of the property they are entitled to the proceeds of the sale, not COREY.

In addition, Judge Pence's rulings that Petitioners claims for damages against COREY are worthless were premised upon the assumption that they had no interest in the Silversword Inn.

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[2] The order confirming the sale is set forth as Appendix F attached to the Brief in Opposition. On page 23a, the name of the judge issuing the order is omitted as being "Illegible." The judge who issued the order was, indeed, Judge Pence.

FAILURE TO RAISE ISSUES BELOW

Respondents claim that Petitioners failed to raise the issue that the *Grinnell* rule does not apply to § 455(a) in the courts below. Respondents cite *Equal Employment Opportunity Commission v. Federal Labor Relations Board*, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986) as authority that certiorari should be denied whenever an issue is not adequately raised below. The applicability of this case is questionable, because it was decided on the basis of a federal statute. 5 U.S.C. § 7123(c).

Whether, and if so at what point, an "issue" has been raised below clearly depends upon how broadly or narrowly the issue is defined. In the instant case, the "issue" of judicial disqualification was clearly raised below. Indeed, the opinion of the Court of Appeals states that Petitioners had made a "broadside attack on the impartiality of Judge Pence." Pet.App., p. 20.

As noted above, Petitioners specifically argued that the extrajudicial rule *does not apply* to § 455(a), in their reply briefs and in their suggestion for hearing *en banc*.

So the real question is not whether the issue was *raised* below, but rather whether it was *adequately* raised.

In addressing this question, it is not necessary to discuss the record in the trial court, since under *Liljeberg* is was not even necessary to raise the issue of judicial disqualification there. Clearly, Petitioners' motions and suggestions for disqualification of Judge Pence adequately raised the issue at the trial level. Moreover, Judge Pence himself cited the statutory provisions of 28 U.S.C. §§ 144 and 455 and the extrajudicial source rule of *Grinnell* in his various decisions

not to recuse himself. His decision was clearly based on the rule of law that nothing on the official record of court proceedings could be used by Petitioners to question his impartiality.

Petitioners submit that it was not necessary to raise the § 455(a) argument in the Court of Appeals either. The argument had been rejected by the Ninth Circuit in *United States v. Olander*, 584 F.2d 876, 882 (9th Cir. 1978), *vacated* 443 U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979) and that holding has been followed in a long line of cases since. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1045-6 (9th Cir. 1987), *aff'd* 496 U.S. ____, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990); *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1341 (9th Cir. 1980); *United States v. Sibla*, 624 F.2d 864, 869 (9th Cir. 1980).

Under the doctrine of *stare decisis*, the panel who heard the appeal below was bound by these precedents and could not have ruled otherwise. Only the entire court sitting *en banc* had the authority to overrule *Olander*. *Charleston v. United States*, 444 F.2d 504, 506 (9th Cir.) *cert. denied* 404 U.S. 916, 92 S.Ct. 241, 30 L.Ed.2d 191 (1971).

Appellants raised the issue of the applicability of the *Grinnell* rule to § 455(a) in their suggestion for hearing *en banc*. It should not have been necessary to raise it earlier. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 118 L.Ed.2d 1094, *reh. den.* 389 U.S. 880, 88 S.Ct. 11, 19 L.Ed.2d 197 (1967).

In spite of this, as noted above, Petitioners *did* specifically raise the issue before the Court of Appeals panel. The panel clearly considered the argument and rejected it. By citing *Grinnell* to preclude consideration of the record as grounds for recusal, the opinion of

the Court of Appeals squarely raises the issue now presented to this court by Petitioners: does the *Grinnell* rule apply to § 455(a)?

CONCLUSION

Based on the foregoing arguments and authorities, Petitioners respectfully request that this Court grant the petition for certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: Honolulu, Hawaii, September 4, 1990.

Respectfully submitted,

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